Supreme Court, U.S.
FILED

No. _____

991443 FEB 24 2000

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

CORPORATION COUNSEL OF
THE CITY OF NEW YORK,

Petitioner,

-against-

MUHAMMAD F.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

MICHAEL D. HESS,
Corporation Counsel of the
City of New York,
Attorney for Petitioner,
100 Church Street,
New York, New York 10007.
(212) 1042 or 1056

LEONARD KOERNER,*
STEPHEN J. MCGRATH,
ALAN BECKOFF,
of Counsel

*Counsel of Record

February 16, 2000

4448

QUESTION PRESENTED

Where the livery cab in which Respondent was a passenger was stopped by the police pursuant to a taxi robbery task force program, was there a violation of his Fourth Amendment right to be free of an unreasonable search and seizure and did the New York Court of Appeals improperly affirm the intermediate appellate court's reversal of the Family Court order that denied suppression of the cocaine that the police recovered from beneath the cab's front seat?

PARTIES TO THE PROCEEDING

Petitioner, the Corporation Counsel of the City of New York, is the Presentment Agency in a juvenile delinquency proceeding pursuant to New York Family Court Act §§ 254 and 310.1. Respondent Muhammad F. was represented by a law guardian throughout the proceedings in the New York State courts.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS 2

JURISDICTION 2

STATEMENT OF THE CASE 2

The Proceedings in Family Court 2
The Appellate Division's Decision and Order 5
The Opinion and Order of the
New York Court of Appeals 6

REASON FOR GRANTING THE PETITION 8

CONCLUSION 11

APPENDIX

Court of Appeals Opinion and Order A-1
Appellate Division Decision and Order A-18
Excerpt of Family Court Transcript A-25

TABLE OF AUTHORITIES

Cases **Page**

Brown v. Texas,
443 U.S. 47 (1979) 7, 9, 11

Delaware v. Prouse,
440 U.S. 648 (1979) 9, 11

People v. Carty,
164 Misc.2d 275, 624 N.Y.S.2d 771
(Sup. Ct., Queens Co., 1995) 10

People v. Boswell,
255 A.D.2d 173, 683 N.Y.S.2d 477
(1st Dept., 1998) ..... 6, n. 1

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 11

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 6

Statutes **Page**

New York Penal Law § 220.50(2) 3

New York Penal Law § 220.16(1) 3

New York Penal Law § 220.09(1) 3

New York Penal Law § 220.06(1) 3

New York Penal Law § 220.03 3

28 U.S.C. § 1257 2

Publications **Page**

Current Intelligence Bulletin,
Department of Health and Human Services
(National Institute on Occupational Safety
and Health), Publication No. 96-100 (July 1996) 8

Newsday, December 2, 1993, p. 7 8

New York Daily News, July 9, 1996, p. 4 8

New York Times, April 4, 1996, p. B3..... 8, n. 3; 9

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

CORPORATION COUNSEL OF
THE CITY OF NEW YORK,

Petitioner,

-against-

MUHAMMAD F.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and order from which petitioner seeks certiorari was entered on November 30, 1999 and is reported at 94 N.Y.2d 136, 700 N.Y.S.2d 77, 722 N.E.2d 45, 1999 N.Y. Lexis 3743 (1999). It affirmed the decision and order of the Appellate Division, First Department, which was entered on November 17, 1998 and is reported at 255 A.D.2d 168, 683 N.Y.S.2d 477, 1998 N.Y. App. Div. Lexis 12398 (1st Dept., 1998). The Appellate Division had reversed the order of the Family Court, New York County, made on August 23, 1996, which had denied Respondent's motion to suppress physical evidence, i.e., the cocaine and vials that the police recovered from

beneath the front seat of the livery cab in which Respondent was a passenger.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV: The right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be infringed[.]

United States Constitution, Amendment XIV, Section 1: No State shall...deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTION

The New York Court of Appeals issued its opinion and order on November 30, 1999. This Court has jurisdiction to review the opinion and order under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

A. The Proceedings in Family Court

This petition arises from a juvenile delinquency proceeding under Article 3 of the New York Family Court Act. At approximately 11 P.M. on July 7, 1996, Police Officer Jeffrey Miller of the Street Crime Unit ("SCU") and his partner stopped a livery cab with three rear-seat passengers in front of 256 West 145th Street in Manhattan. According to his supporting deposition, which was annexed to the petition that the Presentment Agency subsequently filed in Manhattan Family Court, Officer Miller observed Respondent kick a paper bag under the front seat of the cab. Upon recovering the bag, Officer Miller further averred, he found that it contained materials commonly used to package narcotics, specifically vials and vial tops, as well as a quantity of cocaine in crack form.

The juvenile delinquency petition filed by the Presentment Agency charged Respondent with having committed acts which, had he been over the age of sixteen, would have been the crimes of Criminal Possession of a Controlled Substance in the Third Degree [New York Penal Law § 220.16(1), a class B felony]; Criminal Possession of a Controlled Substance in the Fourth Degree [P.L. § 220.09(1), a class C felony]; Criminal Possession of a Controlled Substance in the Fifth Degree [P.L. §§ 220.06(1) and (5), both class D felonies]; Criminal Possession of a Controlled Substance in the Seventh Degree [P.L. § 220.03, a class A misdemeanor]; and Criminally Using Drug Paraphernalia in the Second Degree [P.L. § 220.50(2)], a class A misdemeanor]. Besides Officer Miller's supporting deposition, a certified laboratory report was also attached to the petition. It confirmed that the substance in question was over one-eighth of an ounce of cocaine.

Respondent's Law Guardian, challenging the stop of the cab, moved by Order to Show Cause for suppression of physical evidence. In its answering papers, the Presentment Agency countered that the stop of the cab was lawful because it was done in a nonarbitrary manner by SCU's Taxi-Livery Robbery Task Force.

Pursuant to the Law Guardian's motion, the Family Court conducted a pre-trial Mapp hearing. The Presentment Agency's two witnesses were Captain Richard Savage, the commanding officer of the Street Crime Unit, and Officer Miller. The cab driver was called as a witness for Respondent.

Captain Savage provided background, explaining that in 1993 the New York Police Department created the Taxi-Livery Robbery Task Force as a result of statistics showing that livery cab drivers were the victims of 3600 assaults, robberies and homicides in 1992. Captain Savage further testified that, based on a review of complaint reports city-wide, SCU had determined that the high crime hours against cab drivers were between 6 P.M. and 2 A.M. and that the crimes occurred in particular vicinities within certain precincts, which were then targeted by SCU accordingly. SCU officers, acting under the supervision of

a sergeant, would stop every third or fifth livery cab, depending on the flow of traffic, to inquire as to the driver's safety and distribute pamphlets detailing safety information. According to Savage, crimes against cab drivers declined in every area targeted by SCU.

Captain Savage also testified that particular attention was given to livery cabs with passengers, particularly where the passengers would be looking to see if police were following the cab. Upon approaching a stopped cab, the officers would watch the reaction of the passengers; very often it was found that the passengers would put something on the floor or hide something under themselves or a seat. Captain Savage also said that most of the instructions the officers received were verbal and that they were not required to specifically document the particular facts of each cab stop, unless it resulted in an arrest. There was no quota on how many cabs were to be stopped on a particular night.

Officer Miller testified that when he stopped and talked to cab drivers, he gave them a taxi safety pamphlet, which contained tips on how the drivers could protect themselves from crime. He also said that Police Department policy on stopping cabs was that it be done on "a set basis and not just arbitrarily." On the evening of July 7, 1996, when Respondent was arrested, Officer Miller and his partner planned to stop one in three occupied cabs. At about 11 P.M., he stopped a so-called gypsy cab in front of 256 West 145th Street, Manhattan. There was nothing unusual about this cab other than that it was the third one.

As he approached the cab, Officer Miller testified, he noticed Respondent "turn around nervously and quickly look over his shoulder." Officer Miller also saw Respondent kick something under the front passenger seat. The officer asked the driver if he and his partner could inspect the rear seat of the cab, and the driver agreed. The procedure, Officer Miller said, was to ask the passengers to briefly step out of the cab while the police looked through and under the car seats. In this case, Respondent and the two other passengers got out of the cab without incident. Officer Miller then looked at the area where Respondent had been kicking and saw a rolled-up paper bag sticking

out from beneath the front passenger seat. He recovered the bag, which turned out to contain a plastic bag of cocaine in crack form as well as vials used to package crack.

The cab driver testified that at approximately 11 P.M. on July 7, 1996, he picked up three passengers at 152 Amsterdam Avenue; shortly afterward, the police signaled him to pull over. According to the driver, the police then took the passengers out of the cab one by one and started to pat them down. Finding nothing, he said, the police then looked in the cab and found a bag containing drugs.

Following counsel's summations, the Family Court denied Respondent's suppression motion, finding that the police's actions were lawful (A-25).[1] Subsequently, the Court held a fact-finding hearing, after which it determined that Respondent had committed acts constituting, among others, Criminal Possession of a Controlled Substance in the Third Degree. Following a dispositional hearing, the Court adjudicated Respondent a juvenile delinquent and placed him with the former New York State Division for Youth for eighteen months. Respondent then appealed the Family Court's denial of the suppression motion.

B. The Appellate Division's Decision and Order

In its Decision and Order reversing the Family Court, the Appellate Division, First Department, reviewed federal and New York common law on vehicle stops and found that the procedure employed here left "far too much to the unfettered discretion of the individual officer in selecting which vehicle to stop for the purpose of detaining and questioning its occupants" (A-21); that administrative standards or guidelines promulgated by officials higher than the officers in the field were "conspicuously absent" (A-21); that the officers did not rely on written directives or document their method of selecting cabs to stop (A-21); and that the officers were on a roving patrol and not at a fixed checkpoint (A-21).

---

[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix.

The Appellate Division further found that the method used by the SCU officers here was not "minimally intrusive" (A-22). Citing to United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Appellate Division said that roving stops were more subjectively intrusive than checkpoint stops and that the real purpose of the stops was to observe the passengers, not to educate the cab drivers about safety (A-22).

The dissenting opinion pointed out that the livery cab in this case was stopped by officers from a task force created specifically to prevent crimes against cab drivers (A-22). It further found that the cab stops made under this program met the standards set by the United States Supreme Court and the New York Court of Appeals: that, under certain circumstances, police officers may stop a vehicle for investigatory reasons despite the lack of probable cause, and that the SCU task force utilized a "nonarbitrary, nondiscriminatory and uniform procedure" in stopping cabs (A-23). The dissent also said that stopping a predetermined number of livery cabs was a minimally intrusive way to protect "a group of vulnerable and endangered citizens" and that it was irrelevant whether the policy was written or verbal, as long as it was fixed (A-23-24).

On January 21, 1999, the Appellate Division granted the Presentment Agency's motion for leave to appeal to the New York Court of Appeals on this certified question: "Was the order of this Court, which reversed the order of the Family Court, properly made?"

C. The Opinion and Order of the New York Court of Appeals

The New York Court of Appeals, with one dissent, affirmed the Appellate Division's order.[2] The Court said

---

[2] This case was consolidated with People v. Boswell, 255 A.D.2d 173, 683 N.Y.S.2d 471, 1998 N.Y. App. Div. Lexis 12399 (1st Dept., 1998), in which a different panel of the Appellate Division, looking at similar facts, arrived at a different conclusion and affirmed the trial court's denial of the defendant's suppression motion. In the opinion and

that while the United States Supreme Court has no per se rule requiring fixed checkpoints or roadblocks for suspicionless car stops to be constitutional, there is a balancing test, set forth in Brown v. Texas, 443 U.S. 47, 50-51 (1979), that courts must use to examine such stops. Three factors must be weighed: "[1] the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty." (A-4-5).

While not doubting the public interest in reducing crime against livery cab drivers, the Court said that the prosecution had failed to submit any empirical evidence showing that the car stops employed here were more effective than other, less intrusive, means, such as fixed checkpoints. Regarding the third prong of the test, the Court found that the stops were "excessively and...unjustifiably intrusive, both objectively and subjectively" (A-10). It was too intrusive, the Court said, for the police to ask passengers to step out of cabs when the ostensible purpose of the stops was to distribute safety literature to the drivers. Moreover, the method of stopping the cabs – a nighttime roving patrol with plainclothes officers – would be frightening to occupants of the cabs, the Court said (A-10).

Like the Appellate Division, the Court of Appeals found that the officers in the field were given too much discretion and did not have sufficiently fixed guidelines, other than verbal instructions, to insure that the stops would be carried out in a uniform and non-discriminatory manner (A-11).

The dissent found that the Taxi-Livery Robbery Task Force program was a reasonable means of reducing crime against cab drivers and that the policy used here, stopping every third cab, was uniform and non-arbitrary (A-15-16). Also, because he was a passenger in a cab, the

---

order from which petitioner seeks certiorari, the New York Court of Appeals reversed the Appellate Division and reinstated the trial court's order.

dissent said, Respondent lacked standing to challenge the search of the car's interior unless he could show a reasonable expectation of privacy (A-17).

REASON FOR GRANTING THE PETITION

The issue presented in this petition is vitally important to the reduction of crime against a particularly endangered group of individuals. According to a 1996 study by an agency of the federal government, the occupation with the highest on-the-job homicide rate is taxicab driver, with 140 deaths per 100,000 drivers between 1990 and 1992. "Violence in the Workplace: Risk Factors and Prevention Strategies", Current Intelligence Bulletin 57, Department of Health and Human Services (National Institute on Occupational Safety and Health), Publication No. 96-100 (July 1996). Of those 140 deaths, 40 were New York City cab and livery drivers, who usually died during armed robbery attempts. "Cabby is Most Dangerous Job", New York Daily News, July 9, 1996, p. 4.

In 1992, 45 cab drivers, mostly of livery and gypsy cabs, were murdered in New York City.[3] There were also 3,675 robberies. In response to this disturbing trend, the New York Police Department's Street Crimes Unit, a plain-clothes anti-crime unit first organized in 1972, started to devote virtually all of its resources to protecting cab drivers. Id. See also "On Prowl for Cabbie Killers," Newsday, December 2, 1993, p. 7. The unit's tactics included "stopping cabs for safety checks, questioning

---

[3] Unlike yellow cabs, which pick up fares on the street, livery cabs are supposed to pick up only passengers who have called in advance, but they often do not obey that restriction. So-called gypsy cabs, unlike yellow and livery cabs, are not even licensed by the City. "More than 80 percent of cab crimes involve livery and gypsy-cab drivers, whose old clunkers rumble through the poor, high-crime regions of the city where yellow cabs just don't go." "Cab Crimes Drop, but Drivers' Fears Remain High," New York Times, April 4, 1996, p. B3.

suspicious-looking pedestrians in areas of cab crime, and deploying decoy cabs driven by police officers." By the end of 1995, the number of homicides had been reduced to 17 and the robberies to 1,914. New York Times, April 4, 1996, p. B3, supra.

Although SCU made 3,671 arrests citywide during the first three years that the program was in effect, the unit's commander said that it has been notably difficult to communicate to the livery cab drivers that the police are interested only in their safety, not their "immigration status, the expiration dates of their licenses or even traffic violations." Id. Since many livery and gypsy cab drivers do not operate out of large garages, as do many yellow cab drivers, one way for the police to reach them was to set up a mobile station in a high-crime neighborhood and distribute Police Department decals, which would then serve as advance consent to the police to pull over a cab displaying one to see that the driver was safe. Id. Another was to have patrolling SCU officers pull over a pre-determined ratio of livery cabs to check on driver safety and to distribute safety literature.

We submit that the operation of the Taxi-Livery Robbery Task Force passes the balancing test set forth in Brown v. Texas, supra. As the Court of Appeals recognized, the New York Police Department undeniably met the first prong: it has a legitimate interest in reducing violent crimes against cab drivers. SCU documented, as its commander testified, that they were the subjects of an inordinately high number of homicides, robberies, and assaults over a one-year period and that these crimes were concentrated in certain areas of the city during the late night and early morning hours. The stopping of these cabs by the police to distribute safety literature and to observe the passengers is hardly comparable to the stopping of a car for a license and registration check by the patrolman with time on his hands in Delaware v. Prouse, 440 U.S. 648 (1979).

On the second prong of the Brown v. Texas test, "the degree to which the seizure advances the public interest," the Court of Appeals overstated the significance of empirical data to support the effectiveness of the task

force's operation. One trial judge who examined the SCU program downplayed the significance of measuring the productivity of this, or any other, crime prevention program with sliderule-like precision: "[T]he State is entitled, in the interest of public safety, to bring all available resources to bear without having to spell out the exact efficiency coefficient of each component and of the separate effects of any particular component." People v. Carty, 164 Misc.2d 275, 624 N.Y.S.2d 771, 1995 N.Y. Misc. Lexis 86 (Sup. Ct., Queens Co., 1995). Even so, Captain Savage testified as to the voluminous statistics maintained by SCU, keeping track of patterns of robberies and other violent crimes against cab drivers, descriptions of the perpetrators, and specific geographical areas where such crimes were occurring. He also said that these figures showed that crimes against cab drivers declined in every area targeted by the task force.

As for the third prong, the level of intrusiveness, stopping a pre-determined ratio of occupied cabs in specific high-crime areas during a particular time frame for a safety check was certainly a minimally intrusive way for SCU to accomplish its goal of protecting the livery cab drivers. Limited taxi stops, carried out with some discretion by the police as to how many to make, given the time of day and flow of traffic, are less intrusive than a roadblock, which would result in a stop of every vehicle to enter the area.

The record in this case showed that, despite the lack of written guidelines, the stops were carried out in a uniform and non-discriminatory manner. Officer Miller and his partner were not operating in an arbitrary manner with unfettered discretion when they signaled the driver of the cab in which Respondent was a passenger to pull his cab over to the curb. They were trained and experienced police officers investigating an area of Manhattan which the Police Department had documented as having a high rate of taxi robberies in the late night and early morning hours. The officers were charged with disseminating information to the cab drivers, to whom safety factors might not be apparent, while also watching for possible furtive behavior by the passengers, such as looking over their shoulders or kicking something under the seat, as Respondent here was doing. While the officers were not

required to document each stop unless it resulted in an arrest, they were required to report to their supervising sergeant how many safety pamphlets they distributed during a tour, thus verifying the numbers of stops made. By selecting the number of cabs to stop on a particular night (such as every third one, depending on the flow of traffic) the officers employed a systematic nonarbitrary procedure that facilitated the legitimate governmental function of crime prevention.

The precedents of this Court have established that the police may, under certain circumstances, stop a motor vehicle for an investigatory purpose despite the lack of probable cause or reasonable suspicion to believe that the car or its occupants were involved in a crime. See, e.g., Brown v. Texas, supra; Delaware v. Prouse, supra; United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The New York Court of Appeals has decided an important federal question in a way that, we submit, conflicts with these relevant decisions.

CONCLUSION

For the reasons set forth, petitioner respectfully asks this Court to grant its petition for writ of certiorari.

MICHAEL D. HESS,
Corporation Counsel of the
City of New York,
Attorney for Petitioner.

Leonard Koerner,
Stephen J. McGrath,
Alan Beckoff,
of Counsel.

APPENDIX

IN THE MATTER OF MUHAMMAD F., A PERSON ALLEGED TO BE A JUVENILE DELINQUENT, RESPONDENT.
PEOPLE v. KEITH BOSWELL, APPELLANT.

COURT OF APPEALS OF NEW YORK

November 30, 1999, Decided

DISPOSITION: Case No. 160: Order affirmed, without costs, and certified question not answered as unnecessary. Case No. 161: Order reversed and order of Supreme Court, Bronx County, reinstated.

COUNSEL:

Case No. 160:

Stephen J. McGrath, for appellant presentment agency.

Raymond E. Rogers, for respondent.

Case No. 161:

Richard M. Greenberg, for appellant.

Stanley R. Kaplan, for respondent.

JUDGES: Case No. 160: Opinion by Judge Levine. Chief Judge Kaye and Judges Bellacosa, Wesley and Rosenblatt concur. Judge Smith dissents and votes to reverse in an opinion. Judge Ciparick took no part. Case No. 161: Opinion by Judge Levine. Chief Judge Kaye and Judges Bellacosa, Wesley and Rosenblatt concur. Judge Smith dissents and votes to affirm in an opinion. Judge Ciparick took no part.

OPINION BY: LEVINE, J.:

These appeals arise out of motions to suppress evidence introduced against occupants of taxicabs that were stopped by police officers assigned to a Taxi-Livery Task Force in

New York City. The procedure of the police was essentially the same in both cases. The officers were in plain clothes, using unmarked police cars, on a roving patrol. They selected a location in an area having a high incidence of taxi robberies. In the absence of probable cause, suspicious behavior or any illegal activity on the part of the driver or passengers, they pulled over a predetermined percentage of livery vehicles. The purpose of the stops was to provide a "safety check," to give the drivers crime prevention information and make an assessment of whether the driver may have been in danger. For the reasons that follow, we conclude that the stops in both of these cases were unreasonable seizures violating the Fourth Amendment of the US Constitution.

I.

The material facts in these cases are not in dispute. In *Muhammad F.*, two police officers wearing civilian clothes and driving in an unmarked police car, pulled over a cab in which respondent was a passenger and arrested him after he was found to be in possession of a controlled substance. Respondent was subsequently adjudicated a juvenile delinquent.

According to the suppression hearing testimony of the commanding officer of the Taxi-Livery Task Force, the unit was created in 1992 to address the high incidence of violent crimes against cab drivers. The taxi program targeted certain neighborhoods, especially between 6:00 p.m. and 2:00 a.m. Special attention was given to cabs with passengers. Members of the Task Force would stop a taxi, hand the driver a pamphlet with safety tips and question the cab driver as to his safety, while at the same time watching the reaction of the passengers in the cab. Generally, such a safety check would involve asking the passengers to "step out briefly" or "telling passengers to get out" while the officers searched around and under the seats.

There were no written guidelines as to how the taxi stops were to be carried out. Instead, the officers proceeded on verbal instructions under which the stops were to be done "in a set basis and not just arbitrarily." Whether the officers stopped every cab, or every second, third or fifth

taxi was not based on a fixed format, but varied, depending on circumstances seen and acted upon solely by the officers in the field. The number of stops the officers were to make on their tour throughout the night was totally within their discretion. The officers did not keep any written record of stops they had made.

On the night of July 7, 1996, the patrolmen parked their unmarked car just off 145th Street in Manhattan to conduct taxi safety checks. The officers decided to check one in three occupied cabs. The third vehicle the officers saw which they believed to be an occupied taxicab was the non-medallion taxi in which respondent was riding. They turned onto 145th Street to drive up behind the vehicle, put a flashing light on the dashboard and pulled over the vehicle. One officer then approached on foot while shining a flashlight into the car. When he saw that respondent was acting suspiciously, he ordered the passengers out of the car and searched the back of the cab, where he found a paper lunch-style bag containing crack cocaine. Respondent was arrested.

Supreme Court denied Muhammad F.'s motion to suppress the evidence obtained as a result of this stop, and respondent was ultimately adjudicated a juvenile delinquent for committing acts which, if committed by an adult, would constitute criminal possession of a controlled substance. The Appellate Division reversed (*In re Muhammad F.*, 255 A.D.2d 168, 683 N.Y.S.2d 477), holding that the evidence against respondent was the product of an unconstitutional seizure. One Justice dissented. Petitioner presentment agency appealed pursuant to leave granted by the Appellate Division.

II.

In *Boswell*, defendant was arrested by a plainclothes Sergeant and patrolman belonging to the Taxi-Livery Task Force after their unmarked car stopped a taxicab in which defendant was a passenger. Boswell was also found to be in possession of illegal drugs.

At the suppression hearing, the patrolman testified that the Taxi-Livery Task Force established locations to stop

cabs and hand out safety tips and other literature to the driver. The officers usually stopped every third cab, but there were no written procedures. The Sergeant supervisor determined when to initiate and suspend the operation.

The officers, both in plain clothes, were working a night shift on February 27, 1995, when the Sergeant decided to set up operations on Exterior Avenue in the Bronx. They would stop every third livery vehicle, whether it was occupied or not -- although there was no testimony as to how they could determine that a car with no passengers in the back seat was a non-medallion taxicab.

The two officers did not stop the first two passing cars they believed to be cabs. When a third passed by them, the officers followed it and pulled it over. After the taxi had stopped, the testifying officer shined his flashlight at defendant, noticed he was attempting to conceal a plastic bag and asked him to exit the cab. The bag contained packets of crack cocaine, and defendant was charged with criminal possession of a controlled substance in the third degree.

Supreme Court suppressed the evidence obtained as a result of the stop. The Appellate Division reversed (*People v. Boswell*, 255 A.D.2d 173, 683 N.Y.S.2d 471), but one Justice dissented and granted defendant permission to appeal to this Court.

III.

A brief, suspicionless stop of an automobile, while far less intrusive than a traditional arrest, nonetheless qualifies as a seizure (*see*, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450, 110 L. Ed. 2d 412, 110 S. Ct. 2481; *People v. Spencer*, 84 N.Y.2d 749, 752, 622 N.Y.S.2d 483, 646 N.E.2d 785). The reasonableness of such a seizure "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers'" (*Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 99 S. Ct. 2637 [emphasis supplied; internal citations omitted]). Determining whether these stops are constitutional requires a weighing of "[1] the gravity of the public concerns served by the seizure, [2]

the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty" (*id.*, at 50-51). A critical requirement for all such seizures relates to the "central concern * * * that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field" (*id.*, at 51). Namely, "the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers" (*id.*; *see also*, *People v. Spencer*, 84 N.Y.2d at 758-759).

In *Michigan Dept. of State Police v. Sitz*, the Supreme Court stated that the balancing analysis of *Brown v. Texas* and earlier precedents should be utilized in these "cases dealing with police stops of motorists on public highways" (*Michigan Dept. of State Police v. Sitz*, *supra*, at 450). Employing these standards, in *United States v Brignoni-Ponce* (422 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574), the Court had previously held that a suspicionless, random "roving-patrol" by Border Patrol officers to conduct a brief review of the citizenship or immigration status of the vehicle's occupants was unconstitutional. The roving-patrol stop was described as follows: "a fixed checkpoint * * * was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it" (*id.*, at 874-875). Preventing "the illegal entry of aliens at the Mexican border" was a "valid public interest" (*id.*, at 878-879). The Court held that the stops were unconstitutional, nevertheless, after taking into account "the availability of alternatives to random stops unsupported by reasonable suspicion" (*id.*, at 883, n. 8). Significantly, the Court emphasized that the stops would have subjected residents "to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers" (*id.*, at 882).

By contrast, *United States v Martinez-Fuerte* (428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074) upheld suspicionless stops by the Border Patrol of northbound vehicles at a fixed checkpoint some 60 miles from the

Mexican border, on a major artery from the border (*id.*, at 545). At the checkpoint, still without reasonable suspicion, a uniformed agent directed some of the automobiles to a secondary inspection area for further inquiry regarding the citizenship and immigration status of the occupants (*id.*, at 546-547). After noting the substantial public interest furthered by the practice of routine stops at permanent checkpoints near the border (*id.*, at 556), the Court concluded that a reasonable suspicion requirement "would be impractical because the flow of traffic tends to be too heavy to allow * * * particularized study," and "such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations" (*id.*, at 557 [emphasis supplied]).

As with the roving-patrol stop, the "*objective intrusion* -- the stop itself, the questioning, and the visual inspection"-- was "quite limited" (*id.*, at 557-558 [emphasis supplied]). But "the *subjective* intrusion -- the generating of concern or even fright on the part of lawful travelers -- is appreciably less in the case of a checkpoint stop" (*id.*, at 558 [emphasis supplied]). At routine checkpoint stops, motorists can see that other vehicles are being stopped and "are not taken by surprise" (*id.*, at 558-559). The checkpoint, however, was not required to scrutinize every car in the same manner (*id.*, at 563). In fact, the "selective referrals -- rather than questioning the occupants of every car -- tended to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public" (*id.*, at 560).

In addition, the Court in *Martinez-Fuerte* reemphasized the decisiveness of limiting the discretion of officers in the field.

> "Checkpoint operations both appear to and actually involve less discretionary enforcement activity. * * * The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the effective allocation of limited enforcement resources. * * * And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a

claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review" (*id.*, at 559).

Subsequently, *Delaware v. Prouse* (440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391) held that a police officer may not arbitrarily pull over an automobile merely to check a driver license and registration. "In those situations in which the balancing of interests precludes insistence upon 'some quantum of individualized suspicion' * * * other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'" (*id.*, at 654-655). Thus, in assessing the validity of the suspicionless patrol stop of an automobile chosen at random, the Court weighed (1) the State's "vital interest in ensuring * * * that licensing, registration, and vehicle inspection requirements are being observed" (*id.*, at 658); (2) "whether in the service of these important ends the discretionary spot check [was] a sufficiently productive mechanism to justify the intrusion" (*id.*, at 659); and (3) "the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents" (*id.*, at 657).

The Court emphasized that "[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed" (*id.*, at 661). Thus, *Delaware v. Prouse* held that "persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers" (*id.*, at 663; *see also*, *People v. Spencer*, *supra*, 84 N.Y.2d at 758-759).

By contrast, suspicionless stops of vehicles to conduct sobriety checks at checkpoints under written guidelines are constitutional, even if the location of the roadblock regularly changes (*Michigan Dept. of State Police v. Sitz*, *supra*, 496 U.S. 444; *People v. Scott*, 63 N.Y.2d 518, 483 N.Y.S.2d 649, 473 N.E.2d 1). After reaffirming the applicability of *Brown v. Texas*, the Court in *Sitz* recognized the magnitude of the governmental interest in combating drunken driving (*Michigan Dept. of State Police*

v. Sitz, 496 U.S. at 450-451; *see also*, *People v. John BB.*, 56 N.Y.2d 482, 488, 453 N.Y.S.2d 158, 438 N.E.2d 864).

Sitz also addressed "'the degree to which the seizure advanced the public interest'" (*Michigan Dept. of State Police v. Sitz*, *supra*, at 453). The Court strongly emphasized that in weighing this *Brown v. Texas* factor, a court is not to assess the propriety and the need of the particular means used by law enforcement authorities to advance the public interest. The "effectiveness" part of the test "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger" (*id.*). Rather, it is sufficient for a court to determine that there is some "empirical data" demonstrating the effectiveness of the means chosen by law enforcement officials (496 U.S. at 453-455).

As for the severity of the interference, the Court found that "the intrusion resulting from the brief stop at the sobriety checkpoint [was] for constitutional purposes indistinguishable from the checkpoint stops * * * upheld in *Martinez-Fuerte*" (*Michigan Dept. of State Police v. Sitz*, 496 U.S. at 453). Finally, there was no question in *Sitz* that the discretion of officers in the field was adequately circumscribed, because the checkpoint was operated according to "guidelines setting forth procedures governing checkpoint operations, site selection, and publicity" (*id.*, at 447).

Respondent in *Muhammad F.* and defendant in *Boswell* urge that the absence of a fixed checkpoint or roadblock is alone sufficient to invalidate the seizures in these cases. We do not accept that proposition. The Supreme Court has not adopted a per se rule banning all such stops and requiring a fixed checkpoint or roadblock in all cases. Suspicionless patrol stops are suspect as a general matter because of both their elevated potential intrusiveness and their greater opportunities for the unlimited exercise of discretion by police; no such stop has been upheld by the Supreme Court or our Court when it was conducted at random. Suspicionless stops, however, of "all oncoming traffic at roadblock-type stops" to check driver license and

registration are permissible (*Delaware v. Prouse*, 440 U.S. at 663; *see also*, *id.*, at 664 [Blackmun, J., concurring; "I necessarily assume that the Court's reservation also includes other not purely random stops (such as every 10th car to pass a given point)"]; *Texas v Brown*, 460 U.S. 730, 739, 75 L. Ed. 2d 502, 103 S. Ct. 1535).

Consistent with the foregoing approach, *People v. John BB.* (*supra*, 56 N.Y.2d 482, 453 N.Y.S.2d 158, 438 N.E.2d 864) upheld the constitutionality of patrol stops conducted in a "uniform and nondiscriminatory manner" of all vehicles traveling in a sparsely populated rural area soon after a recent series of burglaries was discovered (*id.*, at 488-489). The "legitimate function of acquiring information regarding the recent burglaries" outweighed the interference with drivers' rights, given that the area "was too large to permit any meaningful utilization of traditional investigative procedures" (*id.*, at 488). Thus, neither New York nor United States Supreme Court precedents require automatic foreclosure of such stops, without examining whether a systematized non-arbitrary method was employed to accomplish them and conducting a particularized inquiry into the reasonableness of the stops, using the *Brown v. Texas* balancing analysis.

IV.

In applying the arbitrariness and *Brown v. Texas* standards to the circumstances presented on the record before us, we conclude that the stops of the taxicabs in these cases were unreasonable and invalid. Regarding the first factor to be weighed, we do not doubt the magnitude of the governmental interest in protecting victim-prone taxicab drivers late at night on urban streets from a crime wave of violent robberies and homicides by disseminating information to the drivers and preventing crimes that are in progress or imminent.

Turning to the effectiveness prong of the Brown v Texas test, it was, of course, for New York City law enforcement officials to decide "which among *reasonable* alternative law enforcement techniques should be employed to deal with [the] serious public danger" of violent taxicab crime (*Michigan Dept. of State Police v. Sitz*, 496 U.S. at 453

[emphasis supplied]). The Prosecution in these cases, however, failed to submit any empirical evidence that this type of patrol stop -- as opposed to fixed checkpoint stops by uniformed officers in marked cars -- was a reasonably effective means of furthering the State interest in reducing violent crimes against taxi drivers (*cf.*, *id.*, at 454-455; *People v. Scott*, 63 N.Y.2d at 523, 526-527). There was no showing of the unavailability of less intrusive or discretionary means to prevent violent crime directed at the drivers of livery vehicles (*see*, *Delaware v. Prouse*, *supra*, at 659). Absent from the record is any evidence that the operation of a stationary checkpoint by uniformed officers in marked police cars was "impractical" (*United States v. Martinez-Fuerte*, *supra*, at 557) or that circumstances did not "permit any meaningful utilization of [such] traditional investigative procedures" (*People v. John BB.*, *supra*, at 488).

Moreover, these stops were excessively and, on these records, unjustifiably intrusive, both objectively and subjectively. As for the objective intrusiveness, the safety checks in *Muhammad F.* were described as routinely involving a request or direction that the passengers step out of the cab while the officers searched it (*cf.*, *United States v. Brignoni-Ponce*, 422 U.S. at 880). Subjectively, in each case, the police employed a roving-patrol stop in which a single, unmarked police car operated by non-uniformed officers pulled over the taxi. Since it was nighttime and there were no signs, cones or flares to warn the drivers that they would be stopped, the motorists were "taken by surprise" (*United States v. Martinez-Fuerte*, *supra*, at 559). The plainclothes officers then proceeded to walk towards the taxicabs, shining their flashlights at the occupants. Because the cab drivers could not "see * * * other vehicles * * * being stopped" and there were no "visible signs of the officers' authority," this is precisely the type of police stop that would "generate concern or even fright on the part of lawful travelers" (*Michigan Dept. of State Police v. Sitz*, 496 U.S. at 452-453). Indeed, given that police chose the locations of the stops because they were high taxi-crime areas, the occupants' first reaction might well have been fear that they were being car jacked or mugged. The subjective intrusion would have been significantly less had there been some means employed to provide assurance that

this was a police operation employing "a uniform system for stopping cars" (*People v. Scott*, *supra*, 63 N.Y.2d at 527).

Of equal significance, the records in these cases contain no showing that the Task Force had attempted to mitigate the constitutional infirmity of "standardless and unconstrained discretion" of "the official in the field" (*Delaware v. Prouse*, *supra*, at 661) other than the vague and purely conclusory testimony that the officers had verbal instructions to stop taxis "in a set basis and not just arbitrarily." For example, had the Police Department produced evidence of particularized guidelines with "listed criteria" that "established procedures for site selection, lighting and signs; avoidance of discrimination by stopping all vehicles, or every second, third or fourth vehicle; [and] location of the screening areas" (*People v. Scott*, 63 N.Y.2d at 522-523), then we would have some assurance that the stops were "being maintained in accordance with uniform procedure which afforded little discretion to operating personnel" (*id.*, at 526; *see*, *Delaware v. Prouse*, *supra*, at 650; *cf.*, *Michigan Dept. of State Police v. Sitz*, *supra*, at 447, 453; *see generally*, LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication,* 89 Mich L Rev 442 [1990]). Since the officers here were not even required to make a written record of stops that had taken place, in conducting our "post-stop judicial review" (*United States v. Martinez-Fuerte*, *supra* at 559), we are relegated to the self-verifying evidence from the officers whose conduct is being challenged to determine whether they were using uniform and nondiscriminatory procedures.

On the scanty proof adduced in these cases, there was a failure either to establish the reasonableness of the patrol stops here under the three-pronged balancing test of *Brown v Texas* (supra) or to satisfy the constitutional requirement that the stops were "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers" (443 U.S. at 51; *cf.*, *People v. John BB.*, supra, at 485 ["stops were conducted in a uniform, nonarbitrary and nondiscriminatory manner"]). Thus, the

evidence was properly suppressed in *Muhammad F.* and improperly admitted in *Boswell*.

With respect to the dissent, the focus of these appeals in our Court was the legality of the stops. The issue of standing was barely mentioned by the Prosecutions; in the lengthy Appellate Division decisions it was not alluded to at all. We therefore choose to assume standing for present purposes, consistently with our precedents, and reach the merits of the issues the parties addressed. As for the dissent's analysis on the merits, we have already noted that the stops in these cases were carried out arbitrarily at the discretion of the officers in the field, whereas *in People v. John BB.* (*supra*), the stop "was made pursuant to a nonarbitrary, nondiscriminatory and uniform procedure, involving the stop of all vehicles" (*id.*, at 488).

Accordingly, in *Muhammad F.*, the order of the Appellate Division should be affirmed, without costs, and the certified question not answered as unnecessary; in *Boswell*, the order of the Appellate Division should be reversed and the order of Supreme Court, Bronx County, reinstated.

SMITH, J. (dissenting):

Because I believe that the procedures used here were appropriate in the effort to prevent crime against taxicab drivers and because I believe that the constitutional rights of the defendants were not violated by the searches, I dissent.

Matter of Muhammad F.

On July 7, 1996, at about 11 PM, the police were in plain clothes patrolling an area in which there had been many robberies of taxicab drivers. The procedure was to stop every third cab, make inquiry as to safety of the driver and give the driver a safety pamphlet. When the taxicab was stopped, the police noticed one of the three passengers lean forward and push something under the front seat of the vehicle. The three persons were ordered out of the vehicle and the vehicle was searched. The search revealed a bag pushed under the front seat containing drugs and drug paraphernalia. Two of the passengers denied that the drugs

belonged to them. Respondent juvenile admitted that the drugs were his. He was arrested and charged with acts constituting criminal possession of a controlled substance and related crimes.

Muhammad F. moved in Family Court to suppress the drugs recovered from the taxicab. The allegations made in support and in opposition to the motion are crucial to a decision in this case. Muhammad F. alleged that the evidence was seized from him in violation of the Fourth, Fifth and Sixth Amendments to the Federal Constitution and to article I, §§ 6 and 12 of the New York State Constitution. The People denied that the rights of the juvenile were violated and further alleged that he had no standing to challenge the seizure of the evidence.

Family Court denied the suppression motion. The Appellate Division reversed, with one Justice dissenting, granted the suppression motion and dismissed the juvenile delinquency petition.

On this appeal, the prosecution/appellant in *Muhammad F.* argues that the Taxi Robbery Task Force Program is a reasonable means of attempting to prevent the robbery and assault of taxicab drivers. Respondent Muhammad F. argues that he was illegally stopped by police officers in plainclothes without any suspicion of wrongdoing and pursuant to an arbitrary, unwritten policy.

People v. Boswell

On February 27, 1995, at about 9 P.M., the police were in an unmarked car stationed at a fixed location in the Bronx. The officers were part of a program to stop every third taxicab in an effort to thwart a series of taxicab robberies. When the taxicab passed the location at which the police car was stationed, the police pursued and stopped it. An officer observed defendant kick a bag under the front seat of the vehicle. When the officer asked if the bag belonged to defendant, he denied ownership. The bag was examined and drugs were recovered.

Defendant Boswell moved to suppress the evidence seized on the ground that it was recovered in violation of

the Fourth Amendment to the Federal Constitution and article I, § 12 of the New York State Constitution. The People denied any violation of these provisions and, in addition, alleged that defendant had no standing to challenge the search of the taxicab.

Supreme Court granted defendant's motion to suppress. In its opinion, the court ruled that defendant had standing to challenge the stop of the vehicle. On reargument, the court adhered to its decision. It also ruled that had the stop of the car been lawful, defendant would lack standing to challenge the search of the bag.

The Appellate Division reversed. In its brief to the Appellate Division, the People argued that defendant lacked standing to contest the search of the vehicle. The standing issue was not, however, addressed by the Appellate Division.

On appeal here, defendant/appellant Boswell argues that the police were engaged in a roving patrol, that the stop of the taxicab was without suspicion and unconstitutional, and that the seizure of the drugs was fruit of that wrongful stop. The People argue that the stop was pursuant to a uniform, nonarbitrary and nondiscriminatory policy of stopping every third taxicab which passed a fixed location and that defendant has no standing to contest the search of the taxicab since he disclaimed ownership of the seized bag.

Discussion

At the heart of these appeals is the policy designed to prevent robberies of and assaults upon taxicab drivers in New York City. At the hearing in *Muhammad F.*, Captain Savage, the commander of the Street Crimes Unit, testified that because of 3,600 robberies of taxicab drivers in 1992, the unit, in 1993, was assigned to concentrate on the prevention of such robberies. He testified further, "The crime rate has declined in every precinct that we targeted." There is no dispute that the government has a legitimate interest in preventing such occurrences. A policy undertaken in response to criminal activities against taxicab drivers can be reasonable and consistent with the

requirements of the Fourth Amendment and article I, section 12 of the New York State Constitution.

Two features of the current policy should be noted. First, the policy is unwritten. While that fact does not make the policy unconstitutional, a written policy would be more susceptible to review. Second, the policy consists of fixed locations where the police have a uniform, nonarbitrary policy of stopping vehicles (*see*, *People v. Ingle*, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39), although a roving patrol, narrowly focused on a particular crime situation, has also been upheld (*People v. John BB.*, 56 N.Y.2d 482, 453 N.Y.S.2d 158, 438 N.E.2d 864, *cert. denied*, 459 U.S. 1010 [all vehicles in a particular area were stopped by a roving patrol after a series of unsolved burglaries]).

To be constitutional, a policy must be uniform and nondiscriminatory. Moreover, the policy cannot be used as a pretext for harassing innocent citizens. Here, the policy was to stop every third taxicab to make inquiry as to the safety of the driver, a nonarbitrary procedure with a reasonable basis.

Thus, inasmuch as the government may institute a policy to prevent the robbery of taxicab drivers, the issue becomes whether in these cases the implemented policy violated the rights of the individuals. The challenges to the stops in these cases are made, not by the driver of the taxicabs, but by the passengers in those cabs. It is clear, however, that the interests of the driver and of the passengers are different. In both cases, the police stopped the drivers in order to insure that they were safe. Insofar as the taxicab drivers were concerned, the stops were akin to the request for information in *People v. De Bour* (40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562), which this Court found permissible. Nevertheless, even assuming that the vehicles were seized, there is nothing improper about the policy itself or the procedures used to effectuate that policy.

The case of *People v. John BB.* 56 N.Y.2d 482, 453 N.Y.S.2d 158, 438 N.E.2d 864, *supra*, supports the action taken here. There, a series of burglaries had occurred in a sparsely populated area of Sullivan County known as the Anawanda-Tennanah Lake region. Although there was no

fixed checkpoint, the police decided to stop every vehicle in a general area. Pursuant to that policy, the car in which John BB. was a passenger was stopped although no evidence existed that the driver or passengers were engaged in any type of illegal activity. The driver was asked for his license and registration. When the driver got out of the car with the requested documents, the police shone a flashlight into the interior, revealing a rifle and a pellet gun that had been reported stolen. A subsequent search of the vehicle revealed additional items taken during the burglaries.

This Court held that the stop in that case was made pursuant to a "nonarbitrary, nondiscriminatory and uniform procedure" with no intent to harass (*id.*, at 488). In determining the constitutionality of a stop, this Court stated:

> "The indefiniteness of the term 'unreasonable' militates against the construction of a general rule of universal application for determining the validity of official intrusions of this nature. Rather, the facts of each case must be examined and the essential inquiry is whether the police conduct may be characterized as reasonable, which in turn requires a balancing of the State's interest in the inquiry at issue against the individual's interest in being free from governmental interference" (*id.*, at 487).

It is significant that in *John BB.*, this Court determined that neither *United States v. Martinez-Fuerte* (428 U.S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074) nor *United States v. Brignoni-Ponce* (422 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574) constituted a barrier to the procedure undertaken. In *United States v. Martinez-Fuerte*, the Supreme Court upheld a fixed checkpoint location to check for illegal aliens even without a requirement of reasonable suspicion. In *United States v. Brignoni-Ponce*, the Supreme Court held that, in a search for illegal aliens, a roving patrol which stopped a vehicle solely because the occupants appeared to be Mexican was unconstitutional and that reasonable suspicion was the standard for stopping such a vehicle.

Turning to the issue of standing, while defendants may have standing to challenge the stop of the taxicabs and to seek suppression of the contraband as fruit of an unlawful stop (*see*, *People v. Millan*, 69 N.Y.2d 514, 516, 516 N.Y.S.2d 168, 508 N.E.2d 903), the evidence may be suppressed only if it is pursuant to an illegal stop directly leading to the discovery of the contraband (*see*, *People v. Rogers*, 52 N.Y.2d 527, 535, 439 N.Y.S.2d 96, 421 N.E.2d 491). Here, arguably, the discovery of the drugs in both cases was due to the suspicious conduct of the passengers, not the stops of the taxicabs. Stated differently, in both cases before us, the search of the vehicle resulted from observed efforts to hide something under the front seat of the vehicle after the taxi was stopped.

In order to challenge the constitutionality of a search, the burden is on the person challenging the search to demonstrate a reasonable expectation of privacy (*People v. Wesley*, 73 N.Y.2d 351, 358-359, 540 N.Y.S.2d 757, 538 N.E.2d 76). In both cases here there is no showing by defendants that they had a legitimate expectation of privacy in the passenger compartment of the taxicabs (*see*, *Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 [passengers did not have standing to contest the search of the automobile since they did not have an expectation of privacy]; *People v. Millan*, 69 N.Y.2d, supra, at 520 [reserving the issue of whether a passenger in a taxicab had an expectation of privacy in the passenger compartment. The taxicab had been stopped after it went through a red light]; *People v. Wesley*, 73 N.Y.2d 351, 540 N.Y.S.2d 757, 538 N.E.2d 76 *supra* [defendants charged with constructive possession of a weapon do not have standing based on that factor alone]). For example, in *Boswell*, defendant denied possession of the bag in which the contraband was discovered, evincing that he had no reasonable expectation of privacy in that bag and, thus, no standing to challenge its admission into evidence (*see*, *id.*, at 360-364). Thus, despite the majority's reluctance to deal with the issue of standing, it is central to both cases.

For these reasons, I dissent and vote to uphold the searches in both cases.

MATTER OF MUHAMMAD F., A PERSON ALLEGED TO BE A JUVENILE DELINQUENT, APPELLANT.

SUPREME COURT OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

November 17, 1998, Decided
November 17, 1998, Entered

COUNSEL:

For Appellant: Raymond E. Rodgers.

For Presentment Agency: Alan Beckoff.

JUDGES: Concur--Rosenberger, Rubin and Tom, JJ.

OPINION: Order of disposition, Family Court, New York County (Leah Marks, J.), entered on or about September 20, 1996, which adjudicated appellant a juvenile delinquent and placed him with the Division for Youth for a period of 18 months upon a fact-finding determination that appellant committed acts which, if committed by an adult, would constitute the crimes of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, and criminally using drug paraphernalia in the second degree, reversed, on the law, without costs, and the petition dismissed.

At the suppression hearing, Officer Miller, assigned to the Street Crime Unit, testified that he was participating in an organized program to conduct safety checks of taxi cabs, including both medallion taxis as well as livery and "gypsy" cabs. He stated that the safety check involved asking "the passengers to step out briefly while we look through under [sic] the seats or in between the slots where the back seat meets the backrest." He testified that while officers assigned to the program were not acting pursuant to any written instructions, departmental procedures required that the stops "be done in [sic] a set basis and not just arbitrarily."

Working the 6:00 P.M. to 2:00 A.M. shift, Officer Miller and his partner, Officer Morley, were driving an unmarked car and dressed in civilian attire. Officer Miller stated that they "were out there looking for street crimes and also taxi robberies" and that he had decided to stop "one in three occupied cabs". At about 11:00 P.M., they pulled over a non-medallion cab carrying three male passengers in front of 256 West 145th Street in Manhattan. The cab was selected because it was the third one encountered, not because there was anything unusual or suspicious about it. At the officers' approach, appellant was observed to "turn around nervously and quickly look over his shoulder" and then kick something under the front passenger seat. After asking the passengers to get out of the cab, Officer Miller recovered a "lunch style" paper bag from the floor under the rear of the front passenger seat. Upon opening the bag, the officer saw that it contained crack vials, tops for crack vials, and loose crack in a plastic bag. Appellant and the two other passengers in the cab were then taken to the precinct house.

On cross-examination, Officer Miller testified that he could not recall the number of cabs he had stopped or the number of safety pamphlets he had handed out to cab drivers during the course of the evening. He stated that, depending on the location and what hours he was working, the number of cabs stopped was "anywhere from five to some nights, probably as high as 20". The officer stated that while he had been given procedures and tactics regarding the stopping of cabs, there were no written directives. Furthermore, he was not required to "memorialize" or document the stops he made.

The taxicab driver testified that, at approximately 11:00 P.M., on July 7, 1996, he picked up three passengers at 152 Amsterdam Avenue. As he was driving with the passengers on 145th Street between 7th and 8th Avenues the police stopped his cab and told him they wanted to check it. The police told the three passengers to exit the car and patted them down. The police then looked in the car and took a bag containing drugs, which they showed him. He stated that the police let him leave because he had nothing to do with the contraband.

Appellant contends that his suppression motion should have been granted because the police stopped the livery cab without any suspicion that the occupants were engaged in wrongdoing. On a motion to suppress physical evidence, the Presentment Agency has the burden of going forward to show the legality of the police conduct in the first instance (*People v. Berrios*, 28 N.Y.2d 361, 366-367). Once this burden is met, the defendant bears the burden of proving its illegality by a preponderance of the evidence (*supra*).

The use of suspicionless fixed checkpoint stops has been upheld by the United States Supreme Court. In *United States v. Martinez-Fuerte* (428 U.S. 543, 558), the Court held that the Border Patrol's routine stopping of a vehicle at a permanent checkpoint located on a major highway from the Mexican border for brief questioning of the occupants was consistent with the Fourth Amendment. The Court held that such limited seizure is not rendered unconstitutional by the absence of individualized suspicion that the particular vehicle contains illegal aliens. Likewise, in *Michigan Dept. of State Police v. Sitz* (496 U.S. 444, 453), the Court upheld sobriety checkpoints operated pursuant to written guidelines in which "uniformed police officers stop every approaching vehicle."

By contrast, the stopping of vehicles by roving patrols on the basis of less than reasonable suspicion has met with disapproval. In *United States v. Brignoni-Ponce* (422 U.S. 873, 883-884), the Supreme Court rejected the practice as employed by Border Patrol agents on public roadways. Similarly, in *Delaware v. Prouse* (440 U.S. 648, 653), the Court invalidated stops made by roving patrols for the purpose of conducting registration and license checks.

Rulings in this State reflect this dichotomy. In *People v. Scott* (63 N.Y.2d 518, 523), the Court of Appeals endorsed the use of fixed checkpoints for the purpose of conducting sobriety checks where established according to written procedures for avoiding discrimination by stopping every vehicle (or every second, third or fourth vehicle). The Court concluded that the constitutionality of the procedure was not "affected by the shifting and temporary nature of the checkpoints." (*Supra*, at 527.) The Court emphasized

that "the kind of fright or annoyance that invalidates a random stop made by a roving patrol is obviated in the case of a temporary checkpoint by the visible signs of authority which the checkpoint entails--signs announcing the purpose, lighting, and identifiable police vehicles and the observable fact that there is a uniform system for stopping cars" (*supra*, at 527, citing *United States v. Hernandez*, 739 F.2d 484, *cert. denied*, 469 U.S. 1021; *Little v. State*, 300 Md. 485, 479 A.2d 903).

The Court of Appeals has endorsed the use of a "roving roadblock in a uniform and nondiscriminatory manner in a sparsely populated area in which there has been a recent series of burglaries" (*People v. John BB.*, 56 N.Y.2d 482, 489, *cert. denied*, 459 U.S. 1010). In that case, three police vehicles were used to stop every car encountered for the purpose of interviewing all persons about the burglaries. The Court reasoned, in a footnote, that the investigative method employed "eliminates any element of arbitrariness in the decision to apply the procedure to a particular vehicle or individual" (56 N.Y.2d, *supra*, at 489, n).

The procedure employed in the instant matter leaves far too much to the unfettered discretion of the individual officer in selecting which vehicle to stop for the purpose of detaining and questioning its occupants (*United States v. Santiago*, 950 F.Supp 590, 596-597 [invalidating stop of taxi by the identical officers using the same procedure]). Conspicuously absent is "the administrative adoption of standards, guidelines or procedures promulgated by higher governmental officials than the police officer in the field" (*People v. John BB.*, *supra*, at 490 [Meyer, J., dissenting]). The cab in which appellant was riding was stopped by police on roving patrol in an unmarked car, not at a marked checkpoint at a fixed location (*cf.*, *People v. Serrano*, 233 A.D.2d 170, *lv. denied*, 89 N.Y.2d 929 [every vehicle stopped by roving roadblock]). The officers neither relied upon a written directive to select which vehicles to stop nor documented the selection method actually employed. Thus, "there was no indication that the cab was stopped pursuant to a routine systematic procedure conducted according to rules or guidelines providing for nonarbitrarily selected vehicle stops (*cf.*, *People v. Scott*, 63 N.Y.2d 518)" (*People v. Concepcion*, 216 A.D.2d 141, 142, *lv. denied*, 86

N.Y.2d 792). As we noted in *People v. Concepcion*, presence in a particular geographic area, such as one known for a high incidence of crime, or participation in a particular activity, such as riding in a livery cab, does not, without more, support a finding of reasonable suspicion of criminal activity (*supra*). Therefore, we cannot agree with the dissenter's conclusion that the stop, in a high-crime area, of an occupied cab is justified.

Nor can the method employed be said to be "minimally intrusive". To the contrary, it fails to meet the criterion enunciated by the United States Supreme Court in *United States v. Martinez-Fuerte* (428 U.S. 543, *supra*). As the Court pointed out (at 558), while the "objective intrusion" of a roving stop -- questioning occupants and visually inspecting the vehicle -- is the same, "the subjective intrusion -- the generating of concern or even fright on the part of lawful travelers -- is appreciably less in the case of a checkpoint stop." Moreover, the avowed purpose of stopping the vehicle to give the driver a safety pamphlet is no less pretextual than that of conducting a license and registration check, struck down in *Delaware v. Prouse* (440 U.S. 648, *supra*). Finally, the officers' practice of stopping only occupied taxi cabs indicates that their interest was to observe the passengers, not to educate the drivers about safety issues.

Concur--Rosenberger, Rubin and Tom, JJ.

DISSENT BY: SULLIVAN

DISSENT: Sullivan, J. P. Dissents in a memorandum as follows: As the testimony shows, the police stopped the taxicab in question as part of the operations of the Taxi-Livery Robbery Task Force, a plainclothes unit formed in 1992 to concentrate on crimes against taxicab drivers, who, according to statistics, were the victims of 3,600 assaults, robberies and homicides in 1992.

Concededly, there was no reasonable suspicion to justify the stop involved. Police Officer Miller testified that on the night in question he was working a 6:00 P.M. to 2:00 A.M. tour, the "high crime" hours, in the Manhattan North precinct, "looking for street crimes and also taxi robberies."

As the officer testified, the Police Department permitted the stopping of cabs as long as it was done on "a set basis and not just arbitrarily." When a cab was stopped, the officers would give the driver a pamphlet containing safety guidelines.

On the evening in question Miller and his partner planned to stop occupied cabs on a one in three basis. At about 11:00 P.M., they stopped a gypsy cab in front of 256 West 145th Street in Manhattan. Other than it being the third cab, there was nothing unusual about it. The police captain who headed the taxi unit testified that he left it to the discretion of the officers on patrol as to whether to stop "every second, third, fifth taxi." There are no quotas as to how many taxi stops should be made in any given tour.

Since only the legality of the stop is at issue, the question is whether the Police Department policy, as implemented here, passes constitutional muster. The United States Supreme Court has held that, under certain circumstances, the police may, despite the absence of probable cause or reasonable suspicion to believe that the car or its occupants were involved in a crime, stop a motor vehicle for investigative reasons. (*See*, *Delaware v. Prouse*, 440 U.S. 648; *United States v. Brignoni-Ponce*, 422 U.S. 873.)

In New York, the Court of Appeals has approved of investigatory automobile stops made "pursuant to a nonarbitrary, nondiscriminatory and uniform procedure" that serves a legitimate function. (*People v. John BB.*, 56 N.Y.2d 482, 488, *cert. denied*, 459 U.S. 1010.) The validity of these stops, where no indicia of criminal activity is present, is to be determined on reasonableness and on a case-by-case basis, balancing the level of intrusion against the State's interest in the inquiry and taking into account the range of discretion afforded to police officers in question. (*See*, *People v. Spencer*, 84 N.Y.2d 749, *cert. denied*, 516 U.S. 905; *People v. Scott*, 63 N.Y.2d 518; *People v. John BB.*, supra.)

Stopping a pre-determined proportion of occupied cabs for a safety check in specified high-crime areas during a particular time frame is a minimally intrusive method of affording a measure of protection to a group of vulnerable

and endangered citizens, who are identifiable by occupation. Such a limited stop is much less intrusive than a roadblock at a particular location, which would entail a stop of every vehicle entering the area. Moreover, the legality of the stop ought not turn on whether the police policy is verbal or written or that the procedure had a roving aspect to it as long as, as is the case here, the policy is a fixed one. The testimony of the police officers was sufficient to establish that "the cab was stopped pursuant to a routine systematic procedure conducted according to rules or guidelines providing for nonarbitrarily selected vehicle stops." (*People v. Concepcion*, 216 A.D.2d 141, 142, *lv. denied*, 86 N.Y.2d 792; *see also*, *People v. Boswell*, 255 A.D.2d 173 [decided herewith].)

I would affirm the order adjudicating appellant a juvenile delinquent.

FAMILY COURT OF THE STATE OF NEW YORK

CITY OF NEW YORK: COUNTY OF NEW YORK

- X

In the Matter of MUHAMMAD FULLER, A Person Alleged to be a Juvenile Delinquent : Docket No. D-7265/96

- X

60 Lafayette Street,
New York, New York 10013
August 23, 1996

B E F O R E: HONORABLE LEAH MARKS, Judge
Part IX

A P P E A R A N C E S:

GARY BRISTOL, ESQ.
Assistant Corporation Counsel
for the Presentment Agency
Petitioner

TANIA PINNOCK, ESQ.
Legal Aid Society
for the Respondent,
Muhammed Fuller

ALSO PRESENT:

Muhammed Fuller, the respondent
Mr. Bilal, the respondent's father

CLAUDINE Y. DAVIDSON
OFFICIAL COURT REPORTER

COLLOQUY

Anything further you wish to say?

MS. PINNOCK: No, your Honor.

THE COURT: Thank you.

As Mr. Bristol has pointed out, the law has changed considerably in this city since years that the cases you gave me were decided. I find that all the police activities in this case was perfectly legal. The motion to suppress is denied. Both statements and the drugs are admissible.

I believe there was an agreement yesterday, Ms. Pinnock, when you asked for an adjournment to today that we would adjourn to trial. It's now to be scheduled. Decide between yourselves.

September 4th. Remand.

COURT REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the stenographic proceedings of the hearing held in the above matter.

CLAUDINE Y. DAVIDSON

OFFICIAL COURT REPORTER